(3)

NO.
91-513
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DELMAS NORTHCUTT, a/k/a D. L. NORTHCUTT,
and LOU NORTHCUTT, a/k/a MARTHA L. NORTHCUTT,
Petitioners

versus

FEDERAL LAND BANK OF WICHITA, a corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LISTING PURSUANT TO COURT RULE 29.1

The named respondent, The Federal Land Bank of Wichita ("FLB"), was a predecessor of The Farm Credit Bank of Wichita ("FCB"), a Federally chartered instrumentality of the United States. FCB was established pursuant to 12 U.S.C.A. § 2011(a) (West 1989) through the merger of FLB and The Federal Intermediate Credit Bank of Wichita. FCB is a part of the Farm Credit System and provides loans to borrowers in the Ninth Farm Credit District, which includes Oklahoma, Kansas, Colorado and New Mexico.

FCB has no parent company or non-wholly owned subsidiaries.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, FCB,[1] respectfully requests that the Court deny the petition for a writ of certiorari (the "Petition") of petitioners Delmas L. Northcutt and Martha L. Northcutt (the "Northcutts"). The Petition seeks review of the judgment and opinion of the Court of Appeals of the State of Oklahoma, Division III (the "Court of Appeals") entered in the proceedings below on February 12, 1991.

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[1] As noted in the Listing Pursuant to Court Rule 29.1, supra, FCB is the successor by merger to the respondent named in the caption.

JURISDICTION

One of the questions presented by the Petition is whether the Northcutts' rights under the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, were violated by the Court of Appeals affirmance of a judgment entered by the District Court of Marshall County, Oklahoma (the "District Court") on January 12, 1989.

However, for the reasons set forth in Proposition I, infra, FCB objects to the jurisdiction of the Court to grant a writ of certiorari to review the due process claim.

STATEMENT OF THE CASE

I. Overview of the Case.

This case was commenced by FLB on March 16, 1986, to obtain a money judgment on a promissory note made by the Northcutts and to foreclose the lien of a mortgage securing the note.[2] (R. 110; FCB App. la-1i)

During the proceedings before the District Court, Congress enacted the Agricultural Credit Act of 1987, Pub. L. No. 100-233, codified at 12 U.S.C.A. §§ 2001-2279aa-14 (West

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[2] The promissory note was made by the Northcutts and delivered to FLB on June 9, 1982, in the original principal sum of $650,000.00. The mortgage securing the note, also executed by the Northcutts on June 9, 1982, covered real property owned by the Northcutts in Marshall County, Oklahoma. (R. 1-10; Farm Credit Bank Appendix la-1i) FLB subsequently waived its right to a money judgment against the Northcutts. (R. 28-29)

1989 & Supp. 1991) and 7 U.S.C.A. §§ 5101-5106 (West 1988 & Supp. 1991) (collectively, the "1987 Act"), which amended the Farm Credit Act of 1971, 12 U.S.C.A. § 2001, et seq. (West 1989 & Supp. 1991).

Two aspects of the 1987 Act are relevant to the present case. The first is the loan restructuring provisions of the 1987 Act set forth in Sections 102(a) and 106 of Title I, 101 Stat. 1574, 1580 (1987) and Section 805(s) of Title VIII, 101 Stat. 1716 (1987), codified at 12 U.S.C.A. §§ 2202 and 2202a (West 1989). The second is the loan mediation provisions of the 1987 Act set forth at Sections 501-506 of Title V, 101 Stat. 1662-64 (1987), codified at 7 U.S.C.A. §§ 5101-5106 (West 1988 & Supp. 1991).

A. The Loan Restructuring Provisions.

Under the 1987 Act's loan restructuring provisions, if a "qualified lender" determines that a loan has become a "distressed loan", the lender must notify the borrower that the loan may be suitable for "restructuring" and that the borrower may submit an application to restructure the loan.[3] 12 U.S.C.A. § 2202a(b)(1) (West 1989). A lender is required to restructure a distressed loan only if the lender determines that the potential cost of restructuring the loan in accordance with the borrower's restructuring plan is less than or equal to the potential cost of foreclosure. 12 U.S.C.A. § 2202a(e) (West 1989). If a lender determines that a distressed loan is not suitable for restructuring and denies the borrower's restructuring application, the borrower may obtain a review of that decision by a credit review committee established by the lender's board of directors, which

[3] The terms "qualified lender", "distressed loan" and "restructuring" are defined at 12 U.S.C.A. § 2202a(a) (West 1989).

by statute, must include farmer board representation. 12 U.S.C.A. § 2202(a) & (b)(2) (West 1989).

In this case, there is no dispute that the Northcutts submitted an application to FCB to restructure their distressed loan. (R. 38: FCB App. 4b) [First Northcutt Affidavit, § C, p.3] After considering the Northcutts' application to restructure their distressed loan, FCB denied the application and informed the Northcutts of the reasons for the denial. (R. 38; FCB App. 4c) [First Northcutt Affidavit, § E, p.3] At the request of the Northcutts, FCB's decision to deny their loan restructuring application was reviewed by a credit review committee (the "Review Committee") pursuant to 12 U.S.C.A. § 2202(b)(2) (West 1989), and the Review Committee upheld FCB's determination that the potential cost of restructuring the Northcutts' loan was greater than the potential cost of foreclosure. (R. 38-39; FCB App. 4c) [First Northcutt Affidavit, §§ F & G, p. 3-4]

B. The State Loan Mediation Provisions.

The second aspect of the 1987 Act relevant to this case is the provisions relating to state-sponsored loan mediation. These provisions authorize the Secretary of Agriculture to provide financial assistance, in the form of matching grants, to states that have qualified agricultural loan mediation programs. 7 U.S.C.A. §§ 5101, 5102 (West 1988). Pursuant to 7 U.S.C.A. § 5103(b) (West 1988), the Farm Credit Administration promulgated 12 C.F.R. § 614.4521 (1990), which directs Farm Credit System institutions, "either concurrently with consideration of loan restructuring...or at any other appropriate time", to participate in certified mediation programs, to "cooperate in good faith" with requests for information made during the course of mediation, and to "present and explore debt restructuring proposals advanced in the course of such mediation."

In this case, subsequent to the Review Committee's decision to uphold FCB's denial of the Northcutts' loan restructuring application, but prior to moving for summary judgment, FCB informed the Northcutts that FCB was willing to participate in Oklahoma's certified agricultural loan mediation program. (R. 39; FCB App. 4d) [First Northcutt Affidavit, § I, p. 4]

Only after the Review Committee's review of the denial of the Northcutts' restructuring application and FCB's offer to participate in state-sponsored mediation, did FCB file its second motion for summary judgment and supporting affidavit on October 5, 1988. (R. 30-35; FCB App. 2a-2b, 3a-3b)[4]

II. Potentially Misleading Statements.

Certain statements set forth in the Petition are misleading[5].

The principal theme of the Petition is that FCB "failed to follow" or "failed to comply with" certain provisions of the 1987 Act, and that there is no evidence in the record to support the Court of Appeals' findings to the contrary.

First, the only evidence that could have been properly considered by the Court of Appeals was the parties' admissions

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[4] FCB's first motion for summary judgment and affidavit in support thereof were filed on May 28, 1987. (R. 11-14) However, the District Court did not rule on this motion.

[5] Court Rule 15.1 admonishes counsel for respondents of their obligation to the Court to point out any perceived misstatements in a petition for a writ of certiorari in the respondent's brief in opposition to the petition.

in the pleadings and the affidavits supporting and opposing FCB's motion for summary judgment. See Rule 13, Rules for the District Courts of Oklahoma, 12 O.S. 1981, Ch. 2, App. While the Northcutts repeatedly argue in their Petition that there is "no evidentiary basis" to support the findings of the Court of Appeals, such is not the case. In fact, the Northcutts' own affidavits show (a) that the Northcutts submitted an application to FCB to restructure their distressed loan, (b) that FCB denied the Northcutts' restructuring application and informed the Northcutts of the reasons for denial, (c) that FCB's denial of the application was reviewed by the Review Committee, which upheld the denial, and (d) that FCB offered to participate in mediation before moving for summary judgment against the Northcutts. (R. 38-39; FCB App. 4a-4f)

Although the Northcutts' affidavits make clear that they disagree with FCB's lending decision to deny the restructuring application, it is simply not accurate to suggest that there is no evidence in the record to support the findings of the Court of Appeals.[6]

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[6] Similarly, the Northcutts argue that the affirmance by the Court of Appeals of the decision of the District Court was a substantive denial of the Northcutts' right to due process under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, because the findings of the Court of Appeals are allegedly not supported by the record. However, as set forth above, the findings by the Court of Appeals (1) that "the Northcutts do not deny that [FCB] in fact considered their loan for restructuring [but that the loan] was judged by [the Review Committee] not to be worthy of restructuring", and (2) "that [FCB] did submit itself to mediation" are supported by statements in the Northcutts' own affidavits opposing summary judgment.

To the extent that the Petition contains statements alleging that there is no evidence in the record to support the findings and judgment of the Court of Appeals, FCB denies the accuracy of such statements. Further, FCB disputes all statements in the Petition to the effect that the Northcutts were not given the opportunity, prior to the filing of FCB's second motion for summary judgment, to (a) submit an application to FCB to restructure their distressed loan, (b) obtain a review by the Review Committee of FCB's determination that the potential cost of restructuring the loan pursuant to the Northcutts' restructuring plan was greater than the potential cost of foreclosure, and (c) participate with FCB in Oklahoma's certified agricultural loan mediation program.

SUMMARY OF ARGUMENT

The Northcutts' claim under the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, should not be reviewed by this Court because the Court has no jurisdiction over such claim; or, alternatively, the Court, as a matter of prudence, should refuse to review such claim.

The Court should also refuse to review the Northcutts' arguments relating to FCB's alleged noncompliance with the 1987 Act because lending decisions of FCB, such as the denial of the Northcutts' loan restructure application, should not be subject to judicial review.

Furthermore, since the Eight Circuit's decision in Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990), there has been no conflict among the courts over whether a federal private right of action may be implied under the 1987 Act.

Finally, the Court should not issue a writ of certiorari to review the holding of the Court of Appeals that participation in state-sponsored mediation is not a prerequisite to foreclosure, because the 1987 Act's foreclosure forbearance provision is expressly not applicable to state mediation, and the question presented is not an important question of federal law which should be decided by this Court within the meaning of Court Rule 10.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE DUE PROCESS CLAIM.

As noted above, the Petition states that one of the questions presented is whether the Northcutts' rights under the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, were violated by the affirmance by the Court of Appeals of the judgment of the District Court. However, the Northcutts' due process claim is raised for the first time in the Petition. The issue was not presented to either the District Court or to the Court of Appeals (either in the principal briefs or in the Northcutts' petition for a rehearing). More importantly, the claim was not presented to the Supreme Court of the State of Oklahoma on the Northcutts' petition for a writ of certiorari filed with that court on or about April 28, 1991. (Northcutt Appendix, Vol. II, p. 134-151)[7]

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[7] Court Rule 14.1(h) provides that where review of a judgment of a state court is sought, the statement of the case shall specify the stage in the proceedings at which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the state courts, and such specific references in the record "as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to

Because the Northcutts' due process claim was not pressed or passed upon below, this Court has no jurisdiction to consider such claim. *See* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79, 108 S. Ct. 1645, 100 L. Ed 2d 62 (1988); Illinois v. Gates, 462 U.S 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); Webb v. Webb, 451 U.S. 493, 501, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).[8]

In Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987), the respondent, a criminal defendant, argued for the first time to this Court that his right to effective assistance of counsel under the Sixth Amendment, U.S. Const. amend. VI, was violated. This Court declined to review the Sixth Amendment claim because the claim had not been raised below and because the judgment under review was that of a state court. Kentucky v. Stincer, 482 U.S. 730 at 747 n.22.[9]

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[7](continued) review the judgment on a writ of certiorari." The Petition contains no such information with respect to the due process claim, and therefore fails to comply with Court Rule 14.1(h).

[8] As initially noted by Chief Justice Rehnquist in Gates, and later by Justice Marshall in Bankers Life, the Court's decisions have been somewhat inconsistent in their characterization of the "not pressed or passed upon below" rule. For purposes of this brief, the requirement imposed by the rule is assumed jurisdictional. However, even if the rule is merely a prudential restriction, FCB urges the Court to deny review of the due process claim on prudential grounds.

[9] In holding that it would not review the constitutional claim, the Stincer Court relied on McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 60 S. Ct. 670, 84 L. Ed. 849 (1940) (only in exceptional cases, and then only in cases coming from the federal courts, will Court consider questions urged by a petitioner or appellant not pressed or passed upon in the courts below), and Heckler v. Campbell, 461 U.S. 458, 468-69 n. 12, 103 S. Ct. 1952, 76 L. Ed. 2d 66 (1983) (court will consider ground not presented to federal court below only "in exceptional cases").

The only case authority cited by the Northcutts in support of their due process argument is Tregea v. Board of Directors of Modesto Irrigation Dist., 164 U.S. 179, 17 S. Ct. 52, 41 L. Ed. 395 (1896). However, even in Tregea, the petitioner had raised his federal constitutional claim in the California courts so that the claim had been pressed and passed upon below.

There is nothing to suggest that this case is an exceptional one, or that the Court should abandon its long-standing practice of strictly applying the "pressed and passed upon below" rule in appeals arising from state courts. Therefore, this Court has no jurisdiction to review the Northcutts' due process claim.[10]

II. FCB'S LENDING DECISIONS SHOULD NOT BE SUBJECT TO JUDICIAL REVIEW.

As noted above, there is no dispute that the Northcutts submitted an application to FCB requesting restructure of their distressed loan, that FCB denied the Northcutts' application, that the Review Committee upheld FCB's denial of the application, or that FCB offered to participate in loan mediation before filing its second motion for summary judgment. Rather, the Northcutts' complaints, as expressed in their affidavits filed with the District Court, are directed at the manner in which FCB reviewed the application and are, in essence, an attack on FCB's lending decisions.

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[10] To the extent that the "pressed and passed upon below" rule is prudential, rather than jurisdictional, the Court should decline to review the due process claim on prudential grounds.

For example, the Northcutts argue that they are entitled to judicial review of issues such as whether FCB "properly" determined the cost of foreclosure, whether the Review Committee "properly" considered an independent appraisal of the subject real property, and whether FCB's "explanation and reasons" for its denial of the Northcutts' restructuring application were "proper". (R. 45; FCB App.) In other words, the Northcutts argue that they are entitled to a judicial inquiry and examination of the propriety of FCB's lending decisions relating to the Northcutts' restructuring application.

The Court of Appeals did not make an express holding as to whether, as a matter of federal law, Farm Credit System borrowers have an implied private right of action under the loan restructuring provisions of the 1987 Act, 12 U.S.C.A. §§ 2202, 2202a (West 1989). Rather, the Court of Appeals held that, regardless of whether or not an implied private right of action exists under the 1987 Act, the record shows that FCB considered the Northcutts' restructuring application and found that the Northcutts' distressed loan was not suitable for restructuring. (Northcutt Appendix, Vol. II, p. 48)[11] The Court of Appeals declined to go further and substitute its business judgment for that of FCB's, as implicitly urged by the Northcutts.

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[11] Although the District Court did hold that no private right of action may be implied from the 1987 Act, the findings of fact and conclusions of law of the District Court are not relevant to this Court's consideration of the Petition. In reviewing a judgment entered by a district court pursuant to Rule 13, Rules of the District Courts of Oklahoma, 12 O.S. 1981, Ch. 2, App., an Oklahoma appellate court is not bound by the findings of the district court, and reviews the judgment de novo. Thompson v. Madison Machinery Co., 684 P.2d 565 (Okla. Ct. App. 1984). With respect to legal conclusions, if the judgment of a district court is correct, it will be affirmed on appeal,regardless of whether the reasons for the (continued)

However, even assuming, arguendo, that a private cause of action may be implied under the 1987 Act to enforce the 1987 Act's loan restructuring provisions, judicial review of the lending decisions of Farm Credit System institutions is neither practicable or desirable.

In Miller v. Federal Land Bank of Spokane, 587 F.2d 415 (9th Cir. 1978) cert. denied, 441 U.S. 962, 99 S. Ct. 2407, 60 L. Ed. 2d 1067 (1979), the Ninth Circuit considered the issue of whether the business decisions of the Federal Land Bank of Spokane were subject to judicial review. The Miller court concluded that:

> [The Federal Land Bank] is a body created by Congress to carry out a defined policy. It is not the business of the courts to second guess the Bank's decisions as to how best to do it, so long as the Bank does not violate the terms of the statute that created it. *See* Greene County National Farm Loan Association v. Federal Land Bank of Louisville, 6 Cir., 1945, 152 E.2d 215, cert. denied 328 U.S. 834, 66 S. Ct. 978, 90 L. Ed. 1610. As the court there pointed out, supervision of the Bank has been entrusted to the Farm Credit Administration, which in turn is under the supervision of the Secretary of Agriculture. It has not been entrusted to the federal courts.

Miller, 587 F.2d at 422.

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[11] (continued) decision, including the district court's conclusions of law, were correct. In re Estate of Bartlett, 680 P.2d 369, 374 (Okla. 1984); Atlantic Richfield Co. v. State ex rel. Wildlife Conservation Comm'n, 659 P.2d 930, 934 n.10 (Okla. 1983). Therefore, although the Northcutts place great emphasis on the District Court's conclusion that no private right of action exists under the 1987 Act, such conclusion is not relevant to this Court's consideration of the Petition.

A similar opinion was expressed by the Supreme Court of Kansas in Federal Land Bank of Wichita v. Read, 237 Kan. 751, 703 P.2d 777 (1985). In Read, the court was called upon to review an alleged failure of FLB to comply with 12 C.F.R. § 614.4510 (1985), which required forbearance of foreclosure upon a finding by FLB that three conditions were met: (l) the borrower must be cooperative, (2) the borrower must make an honest effort to meet the conditions of the loan contract, and (3) the borrower must be capable of working out the debt burden.

The defendants in Read urged the court to review and overturn FCB's credit decision that the defendants did not meet the necessary criteria for forbearance under the regulation. However, the Kansas Supreme Court held that FCB's decision should not be subject to judicial review. The court stated that:

> The land bank simply reached a conclusion adverse to the landowner s position.
>
> ... [W]e know of no reason why the trial court should be required to hear evidence upon and redetermine the issue of ability to work out of the debt burden. That matter is best left to those in whom the land bank places that responsibility .... We find no statutory authority for court review of such a determination.

Read, 703 F.2d at 780.

In a similar case, the Supreme Court of North Dakota held that the lending decisions of Farm Credit System institutions should not be subject to judicial review, absent compelling circumstances. In Federal Land Bank of St. Paul v. Asbridge, 414 N.W.2d 596 (N.D. 1987), the court employed an analysis similar to that in Read to review the claims of mortgage foreclosure defendants that they were "entitled to consideration of administrative forbearance on their loan obligations under

the applicable FLB regulations and policies." 414 N.W.2d at 597. The Asbridge court held for the Federal Land Bank stating that:

> "If a [forbearance] policy has been adopted and the borrower's qualifications for forbearance have been considered, judicial review of the substantive decision about forbearance is limited. A trial court may not overturn a loan officer's determination of ineligibility for forbearance relief unless the borrower can prove that the FLB abused its discretion by acting in an arbitrary, capricious, unreasonable or unconscionable manner.

Id.

The rationale of the courts in Miller, Read and Asbridge is equally applicable to lending decisions by Farm Credit System institutions made under the loan restructuring provisions of the 1987 Act. To hold otherwise, would permit judicial review of every aspect of the decision-making processes of those institutions relating to the restructuring of distressed loans. This result is neither desirable or supported by relevant authority, such as legislative history.

Accordingly, the Court should not grant the Northcutts' request to review the lending decisions of FCB relating to the denial of the Northcutts' restructuring application.

III. THE JUDGMENT OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER COURTS.

If the judgment of the Court of Appeals holds that no private right of action may be implied from the loan restructuring provisions of the 1987 Act as a matter of federal law,[12] such judgment is consistent with the reported decisions of both other state courts of last resort and the United States courts of appeals.

The first United States court of appeals decision to analyze the private right of action issue in the context of a claim under the 1987 Act was Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), cert. denied ____U.S.____, 110 S. Ct. 867, 107 L. Ed. 2d 951 (1990). In Harper, the district court had held that the defendants, Myron and Jane Harper, were entitled to assert a private right of action against the former Federal Land Bank of Spokane and Willamette Production Credit Association for alleged failure of those institutions to comply with the loan restructuring provisions of the 1987 Act. The Ninth Circuit, however, reversed the district court, holding that application of the implied private right of action analysis set forth in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975),[13] requires that no private right of

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[12] As noted in Proposition II, supra, such a holding was not expressed. Rather, the Court of Appeals found that because the evidence showed FCB followed all required procedures, the District Court should be affirmed whether or not such a private right of action exists.

[13] In Cort, this Court set forth four factors to determine whether Congress intended to imply a private cause of action in a federal statute. The Cort analysis was subsequently modified in Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L. Ed. 2d 82 (1979), Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L. Ed. 2d 146 (1979) and Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, (continued)

action be implied from the 1987 Act.

Since Harper, two other United States courts of appeals have held that no private right of action may be implied under the loan restructuring provisions of the 1987 Act. *See* Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990); Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990).[15] *See also* Walker v. Federal Land Bank of St. Louis, 726 F. Supp. 211 (C.D. Ill. 1989). Also, since Harper, three state courts have held that no private right of action may be implied under the 1987 Act as a matter of federal law. Sierra-Bay Federal Land Bank Ass'n v. Superior Court, 227 Cal. App. 3d 318, 277 Cal. Rptr. 753, 754-55 (Cal. Ct. App. 1991); Logan Ranch, Karg Partnership v. Farm Credit Bank of Omaha, 238 Neb. 814, 472 N.W. 2d 704, 710-11 (1991); Interstate Production Credit Ass'n v. MacHugh, 61 Wash. App. 403, 810 P.2d 535, 538 (1991).

Because there is no conflict among the reported decisions of the United States courts of appeals or the decisions of the state courts of last resort regarding the existence of an implied federal right of action under the 1987 Act, this Court should deny the Petition.

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[14] (continued) 87 L. Ed. 2d 96 (1985). *See* Thompson v. Thompson, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988). The focal point of inquiry is now the intent of Congress to create a private remedy, although the original four Cort factors are still used as guides to discern that intent.

[15] The Zajac holding was expanded in Euerle Farms v. Farm Credit Services of St. Paul, 928 F.2d 274 (8th Cir.), cert. denied 60 U.S.L.W. 3057, 60 U.S.L.W. 3222 (1991) from the loan restructuring provisions, 12 U.S.C.A. §§2202, 2202a (West 1989), to include the entire 1987 Act.

IV. THE COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION THAT MEDIATION IS NOT A PREREQUISITE TO FORECLOSURE.

The only issue of federal law actually decided by the Oklahoma Court of Appeals was that participation by FCB in Oklahoma's agricultural loan mediation program was not a prerequisite to foreclosure of the lien of FCB's mortgage. This decision, however, is so clearly correct, and is of such relatively minor importance, that the Court should deny the Northcutts' Petition to review such issue.

The Northcutts' argument that participation in state-sponsored mediation is a prerequisite to foreclosure by a Farm Credit System institution is based on a misunderstanding of 12 U.S.C.A. § 2202a(b)(3) (West 1989). Section 2202a(b)(3) provides that "No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section." (Emphasis added)

The Northcutts argue that because the loan mediation provisions, codified at 7 U.S.C.A. §§ 5101-5106 (West 1988 & Supp 1991), are part of the 1987 Act (i.e. Pub. L. No. 100-233), the forbearance provision of 12 U.S.C.A. § 2202a(b)(3) (West 1989) prohibited the continuance of the foreclosure proceeding before the District Court until FCB and the Northcutts had completed the mediation process.

However, application of the 1987 Act's foreclosure forbearance provision is expressly limited to the loan restructuring provision codified at Section 2202a of title 12. Section 2202a(b)(3) simply does not require participation by Farm Credit System institutions in state-sponsored mediation, as the

state mediation provisions, although admittedly part of the 1987 Act, were enacted not only in a separate section of the 1987 Act, but in a separate title of that act.[17]

Because the 1987 Act's foreclosure forbearance provision, 12 U.S.C.A. § 2202a(b)(3) (West 1989), is expressly not applicable to the state-sponsored mediation provisions of 7 U.S.C.A. § 5101-5106 (West 1988 & Supp. 1991), and because the issue is not an important question of federal law which should be settled by this Court, the Northcutts' Petition should be denied. See Court Rule 10. l(c) .

[17] The loan restructuring provisions of the 1987 Act are set forth in Sections 102(a) and 106 of Title I, 101 Stat. 1574, 1580 (1987) and Section 805(s) of Title VIII, 101 Stat. 1716 (1987), and were later codified at 12 U.S.C.A. §§ 2202 and 2202a (West 1989). The loan mediation provisions of the 1987 Act, on the other hand, are set forth at Sections 501-506 of Title V, 101 Stat. 1662-64 (1987), and were later codified at 7 U.S.C.A. §§ 5101-5106 (West 1988 & Supp. 1991).

CONCLUSION

For the reasons set forth above, the Court should deny the petition of Delmas L. Northcutt and Martha L. Northcutt for a writ of certiorari to review the judgment and opinion of the Court of Appeals of the State of Oklahoma, Division III entered in the proceedings below on February 12, 1991.

Respectfully submitted,

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APPENDIX OF RESPONDENT
THE FARM CREDIT BANK OF WICHITA

IN THE DISTRICT COURT OF MARSHALL COUNTY,
STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA, a Corporation,

Plaintiff

vs.

DELMAS NORTHCUTT a/k/a D. L. NORTHCUTT and LOU NORTHCUTT a/k/a MARTHA L. NORTHCUTT; FIRST NATIONAL BANK, MADILL, OKLAHOMA; GLENN NORTHCUTT and TOMMYE NORTHCUTT; EXCHANGE NATIONAL BANK & TRUST COMPANY OF ARDMORE, OKLAHOMA; ACACIA PIPELINE CORPORATION one and the same as ACACIA PIPELINE CORP.; NATURAL GAS PIPELINE COMPANY OF AMERICA; KONAWA INSURANCE COMPANY, a corporation,

Defendants.

Filed
Donna Rogers
March 26, 1986
County Clerk
Of Marshall
County

No. C-86-36

PETITION

Comes now the plaintiff, The Federal Land Bank of Wichita, and for its cause of action against the defendants above named, alleges and states:

1. That the plaintiff is a corporation duly created, organized and existing under and by virtue of an Act of Congress entitled "The Federal Farm Loan Act", approved July 17, 1916,

and acts amendatory thereto and is now operating under the Farm **Credit Act of** 1971, 12 U.S.C.A. 2001, et seq.; that it maintains its principal office and place of business in the City of Wichita, State of Kansas, and that it is authorized and chartered to transact and do business in the States of Kansas, Oklahoma, Colorado and New Mexico.

2. That on the 9th day of June, 1982, the defendants, DELMAS NORTHCUTT a/k/a D. L. NORTHCUTT and LOU NORTHCUTT a/k/a MARTHA L. NORTHCUTT, Husband and Wife, for a good and valuable consideration made, executed and delivered to The Federal Land Bank of Wichita, hereinafter referred to as mortgagee, their written promissory note, for value received , for the principal sum of $650,000.00 with interest from date at the rate of 13% per annum, said interest rate being a variable rate. A true and correct copy of said note is attached hereto, marked exhibit "A" and made a part hereof.

3. That as a part of the same transaction, and to secure the payment of the same, the said maker, then the owners of the real estate hereinafter described, made, executed and delivered to said mortgagee their real estate mortgage in writing *and* therein *and* thereby mortgaged and conveyed to said mortgagee the following described real estate situate in Marshall County, State of Oklahoma, to-wit:

TRACT 1-
The NE/4 SE/4 of Section 2, Township 8 South, Range 4 East, containing 40 acres, more or less;

The SW/4 SW/4 SE/4, Section 1, Township 8 South, Range 4 East;

All that part of the NE/4 NW/4 NE/4 and 5/2 NW/4

NE/4 and SW/4 NE/4 and E/2 NW/4 SE/4 and W/2 NE/4 SE/4 and N/2 SE/4 SE/4 and N/2 5/2 SE/4 SE/4 lying and being West of the centerline of the highway Right of Way, and NW/4 NW/4 SE/4 and NE/4 SW/4 SE/4 and N/2 SE/4 SW/4 SE/4 and E/2 NW/4 and SE/4 SW/4 NW/4 and N/2 SW/4 and NW/4 SE/4 SW/4 and West 165 feet of the NE/4 SE/4 sw/4 of Section 1, Township 8 South, Range 4 East;

The East 66 feet of the NE/4 NE/4 NW/4 and all that part of the NW/4 NW/4 NE/4 lying and being North and West of the diagonal line between the NE corner and the SW corner of the NW/4 NW/4 NE/4, all in Section 12, Township 8 South, Range 4 East;

TRACT
1 and 2

All that part of the E/2 NE/4 and E/2 W/2 NE/4 and E/2 NW/4 SE/4 and NE/4 SE/4 and N/2 SE/4 SE/4 and N/2 S/2 SE/4 SE/4 of Section 1, Township 8 South, Range 4 East lying and being East of the center line of Highway Right of Way line, LESS AND EXCEPT the surface to the following tracts of land, to-wit:

Beginning at a point 47 yards North of the SE corner of the SE/4 NE/4, thence North 175 yards; thence West 140 yards: thence South 175 yards, thence East 140 yards to the place of beginning; and

Beginning at a point 93 yards South of the NE corner of the NE/4 SE/4; thence West 80 yards; thence South 123 yards; thence East 80 yards; thence North 123 yards to the place of beginning; and

Beginning at the SE corner of SE/4 NE/4; thence North 47 yards; thence West 70 yards; thence South 140 yards; thence East 70 yards; thence North 93 yards to the place of beginning; and

Beginning at a point 216 yards South of the NE corner of NE/4 of SE/4; thence West 80 yards; thence South 61 yards; thence East 80 yards; thence North 61 yards to the place of beginning; and

A tract of land beginning at the Northeast corner of the SE/4 SE/4 of Section 1, Township 8 South, Range 4 East; thence North a distance of 189 . 63 feet; thence West a distance of 46.20 feet; thence South 80 degrees 54 minutes 50 seconds West a distance of 177.91 feet; thence South 4 degrees 57 minutes 20 seconds East a distance of 307.93 feet; thence North 88 degrees 27 minutes East a distance of 149.13 feet; thence East a distance of 51.78 feet; thence North a distance of 141.26 feet to the point of beginning, containing 1.59 acres, more or less; and

Beginning at a point 866.6 feet North and 481.2 feet West of the Southeast corner of Section l; thence North 330 feet; thence West 660 feet; thence South 330 feet; thence East 660 feet to the place of beginning;

TRACT 3:

The SE/4 SE/4 and SW/4 SE/4 and SE/4 SW/4 and NW/4 SE/4 and NE/4 SW/4 and S/2 NW/4 SW/4, all in Section 35, Township 7 South, Range 4 East; containing 220 acres, more or less;

TRACT 4:

The N/2 NE/4 and SE/4 NE/4 and N/2 NE/4 SE/4 and a tract of land in N/2 NW/4 and more particularly described as beginning at the Northwest corner of Section 6, Township 8 South, Range 5 East; thence

East 880 yards; thence South 297 yards; thence West 880 yards; thence North 297 yards to the point of beginning, all in Section 6, Township 8 South, Range 5 East, containing 194 acres, Also W/2 SE/4 SE/4 SE/4 and NW/4 SE/4 and SW/4 SE/4 and W/2 SE/4 SE/4 and NE/4 SE/4 SE/4 and NW/4 NE/4 SE/4 and SW/4 NE/4 SE/4 less 2 1/2 acres out of the Northeast corner of SW/4 NE/4 SE/4 for U.S.A. and E/2 of Lot 4 and SE/4 SW/4 all of Section 31, Township 7 South, Range 5 East;

all of the above being in Marshall County, Oklahoma.

with the buildings and improvements and the appurtenances, hereditaments and all other rights thereunto appertaining or belonging and all fixtures then or thereafter attached or used in connection with said premises. That said mortgage was duly executed and acknowledged according to law, the mortgage tax duly paid thereon and was on the 6th day of July, 1982, filed in the office of the County Clerk of Marshall County, Oklahoma, and therein recorded in Book 441 at page 387 which mortgage with endorsements thereon and the record thereof is incorporated herein by reference as provided by law and marked exhibit "B".

4. That said note and mortgage provide that if default be made in the payment of any of the monthly installments, and if

such default is not made good prior to the due date of the next installment or on failure or neglect to keep or perform the entire principal sum and accrued interest, together with all other sums secured by said mortgage shall at once become due and payable, without notice, at the option of the holder thereof and the holder shall be entitled to foreclose said mortgage and recover the unpaid amount of the principal of said note, the unpaid interest thereon, and all expenditures of the mortgagee and to have said premises sold and the proceeds applied to the payment of the indebtedness secured thereby, together with all legal and necessary expense and all costs.

5. That default has been made upon said note and mortgage in that the installment due October 1, 1985, has not been paid and that said note and mortgage have been in constant default since that date.

6. That the Federal Land Bank of Wichita is the holder and owner of said note and mortgage and the indebtedness evidenced and secured thereby. That by reason of the default as hereinbefore alleged The Federal Land Bank of Wichita, on the 11th day of February, 1986, exercised its option to declare and did declare the whole of the unmatured balance of such principal indebtedness due and payable; that the Federal Land Bank of Wichita states that there is now due and owing to it the sum of $715,780.34 plus interest at the rate of 14.50% per annum or $288.30041 per diem from 11th day of February, 1986; that the Federal Land Bank has employed attorneys for the purpose of prosecuting this action, and is entitled to have its mortgage foreclosed and to have the various sums hereinbefore alleged to be due and owing to it, including a reasonable attorneys fee, adjudged and decreed to be a first and prior lien upon the said mortgaged property and to have said property sold with or without appraisement, at the option of the mortgagee, such

option to be exercised at the time judgment is rendered, to satisfy the whole of said amounts of indebtedness, interest, attorney's fees, due or delinquent ad valorem taxes thereon, abstracting fees and the costs of this action.

7. Plaintiff further states that the remaining Defendants claim some right, title or interest in and to the real estate sought to be foreclosed in this action for and on account of the following, towit:

a. That the defendant, First National Bank, Madill, Oklahoma, is made a party defendant herein by reason of a mortgage dated November 10, 1980 and recorded in Book 413 at Page 420, in the office of the County Clerk of Marshall County, Oklahoma. This mortgage was subordinated to the mortgage of Federal Land Bank which is filed in Book 441 at page 387.

b. That the defendants, Glenn Northcutt and Tommye Northcutt, are made party defendants herein by reason of a mortgage dated November 18, 1977, recorded in Book 372 at page 74 in the office of the County Clerk of Marshall County, Okahoma. This mortgage was subordinated to the mortgage of Federal Land Bank which is filed in Book 441 at Page 387.

c. That the defendant, Exchange National Bank & Trust Company of Ardmore, Oklahoma, is made a party defendant herein by reason of a mortgage dated March 20, 1985 and recorded March 21, 1985 in Book 484 at Page 97, in the office of the County Clerk of Marshall County, Oklahoma.

d. That the defendant, Acacia Pipeline Corporation one and the same as Acacia Pipeline Corp., is made a party defendant herein by reason of a right of way and easement recorded April

25, 1985 in Book 485 at page 375, in the office of the County Clerk of Marshall County, Oklahoma.

e. That the defendant, Acacia Pipeline Corporation one and the same as Acacia Pipeline Corp., is made a party defendant herein by reason of a right of way and easement recorded October 9, 1985 in Book 491 at Page 459, in the office of the County Clerk of Marshall County, Oklahoma.

f. That the defendant, Natural Gas Pipeline Company of America, is made a party defendant herein by reason of a right of way and easement recorded February 6, 1986 in Book 494 at Page 546, in the office of the County Clerk of Marshall County, Oklahoma.

g. That the defendant, Konawa Insurance Company, a corporation, is made a party defendant herein by reason of a judgment against Delmas Northcutt in the total amount of $40,817.74, with interest thereon from February 21, 1985 at the rate of 10% per annum, until paid, in Case No. SC-84-189, said judgment being recorded March 4, 1985 in Book 483 at Page 295, in the office of the County Clerk of Marshall County, Oklahoma.

8. That each and all of the defendants in this action assert or claim to have some adverse title to, interest in or lien upon the premises hereinbefore described and the subject matter of this action, or some part or portion thereof, the exact nature and extent of which The Federal Land Bank of Wichita is unable to set forth, but plaintiff alleges that all such claims, title, or liens, if the same in fact exist and regardless of the nature and extent thereof, are junior and inferior and subordinate to the rights of The Federal Land Bank of Wichita and the lien of its mortgage as herein sued upon; and that each of said defendants should be

forever barred, foreclosed and precluded from ever having, asserting or claiming to have any right, title, interest, estate, equity or lien whatever in or to said mortgaged premises or any part or portion thereof.

WHEREFORE, plaintiff prays judgment against the defendants, DELMAS NORTHCUTT a/k/a D. L. NORTHCUTT and LOU NORTHCUTT a/k/a MARTHA L. NORTHCUTT, Husband and Wife, for the sum of $715,780.34 plus interest at the rate of 14.50% per annum or $288.30041 per diem from the 11th day of February, 1986, for reasonable attorney's fees and for all costs of this action; that said Federal Land Bank of Wichita's mortgage be foreclosed and decreed to be a first and prior lien upon all of said mortgaged property and be ordered sold according to law and with or without appraisement, at the option of the mortgagee, in satisfaction of said money judgment, or any balance remaining unpaid thereon, and that from and after the sale of said mortgaged premises and the confirmation thereof by the Court, each and all of the defendants, and any and all persons claiming by, through or under them, or any of them, be forever barred and foreclosed from having or claiming to have any right, title, equity or lien therein or thereto; and for all other proper relief.

s/David W. Kelly
Attorney For Plaintiff

[Exhibits Omitted]

IN THE DISTRICT COURT OF MARSHALL COUNTY,
STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA, a Corporation,

Plaintiff,

-vs-

DELMAS NORTHCUTT, et al.,

Defendants.

FILED
Wanda Pearce
Oct. 5, 1988
Court Clerk of
Marshall Co.

No. C-86-36

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, The Federal Land Bank of Wichita, a corporation, and moves the Court to render a judgment in Plaintiff's favor in accordance with 12 Okla. St. Ch. 2 App. Rule 13 on the grounds and for the reason that there is no substantial controversy as to any material fact as between the Plaintiff and the Defendants as evidenced by the instruments on file herein. Therefore, said Plaintiff is entitled to judgment as a matter of law.

This motion is based upon the Affidavit of Robert C. Maples, Jr., Credit Officer of Farm Credit Services, which states under oath, the amounts due and owing to Plaintiff. Further this motion is based upon the answers of the defendants Eugene Embry, Delmas Northcutt and Lou Northcutt, Glenn Northcutt and Tommye Northcutt, Exchange National Bank & Trust Company of Ardmore, Oklahoma, and Konawa Insurance Company on file herein.

WHEREFORE, premises considered, Plaintiff prays

summary judgment against the Defendants Delmas Northcutt a/k/a D. L. Northcutt and Lou Northcutt a/k/a Martha L. Northcutt for personal judgment, and for judgment against the remaining defendants determining that the Federal Land Bank of Wichita, a Corporation, has a first and prior mortgage.

s/David W. Kelly
DAVID W. KELLY OBA #4932
Attorney for The Federal Land
Bank of Wichita, a corporation
512 W. Evergreen
P. 0. Box 1047
Durant, OK 74702
(405) 924-1202

Authority: 12 Okla. St. Ch. 2 App. Rule 13

[Certificate of Mailing Omitted]

IN THE DISTRICT COURT OF MARSHALL COUNTY,
STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF
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STATE OF OKLAHOMA)
) ss. AFFIDAVIT
COUNTY OF BRYAN)

Robert C. Maples, Jr., being first duly sworn upon oath states: That he is a Credit Officer of Farm Credit Services, and duly authorized to make this affidavit.

Further, affiant states that on the 26th day of March, 1986, a foreclosure action was filed by The Federal Land Bank of Wichita, a corporation, against Delmas Northcutt a/k/a D. L. Northcutt and Lou Northcutt a/k/a Martha L. Northcutt, husband and wife, being in default on a note and mortgage dated June 9, 1982. Said note and mortgage have been in constant default since the 1st day of October, 1985.

That the amount due on said note and mortgage as of the 3rd day of October, 1988, is the sum of $715,780.34 plus interest; that proceeds have been received from a fire insurance policy in the amount of $194,300.00; therefore the balance due

as of October 3, 1988, is the sum of $783,930.67; that interest is accruing with a per diem rate of $210.0406; all such amounts are set forth in more specific detail in Attachment "A" attached hereto and made a part hereof.

That the note and mortgage have not been cancelled and The Federal Land Bank of Wichita is the holder of said note and mortgage, and said note and mortgage have not been paid.

That The Federal Land Bank mortgage is a first mortgage, recorded in Book 441 at Page 387 in the office of the County Clerk of Marshall County, Oklahoma, and is superior to the mortgage of First National Bank, Madill, Oklahoma, which is recorded in Book 413 at Page 420; and is superior to the mortgage of Glenn Northcutt and Tommye Northcutt recorded in Book 372 at Page 74; and is superior to the mortgage of Exchange National Bank & Trust Company of Ardmore, Oklahoma, recorded in Book 484 at Page 97; and is superior to a right of way and easement of Acacia Pipeline Corporation one and the same as Acacia Pipeline Corp., recorded in Book 485 at Page 375; and is superior to the right of way easement of Acacia Pipeline Corporation one and the same as Acacia Pipeline Corp., recorded in Book 491 at Page 459; and is superior to the right of way and easement of Natural Gas Pipeline Company of America, recorded in Book 494 at Page 546; and is superior to the judgment of Konawa Insurance Company, recorded in Book 483 at Page 295, all being recorded in the office of the County Clerk of Marshall County, Oklahoma.

Dated this 5th day of October, 1988.

s/ Robert C. Maples, Jr.
ROBERT C. MAPLES,JR.

[Acknowledgement and Attachment Omitted]

ATTACHMENT TO RESPONSE OF DEFENDANTS
NORTHCUTT TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
BRIEF IN SUPPORT THEREOF
FILED OCT. 17, 1988, WANDA PEARCE
COURT CLERK OF MARSHALL CO.

STATE OF OKLAHOMA)
) ss. AFFIDAVIT
COUNTY OF MARSHALL)

I, DELMAS NORTHCUTT, on behalf of Delmas Northcutt and Lou Northcutt upon oath, state as follows:

I have read the allegations set forth in the Response of Defendants Delmas Northcutt and Lou Northcutt to Plaintiff's Motion for Summary Judgment and Brief in Support Thereof and do reiterate them as if set forth in full. In particular, there are legal reasons and factual issues and disputes which make the Plaintiff's Motion for Summary Judgment premature and which make the Plaintiff's Motion for Summary Judgment subject to be overruled, including the following:

A. The Plaintiff has not processed or completed the consideration of the Northcutt loan for restructuring and, therefore, §4.14(7)(b)(3) is applicable, which states as follows:

"No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."

B. Defendants Northcutt and the note and mortgage involved herein and this legal proceeding qualify as a distressed loan and foreclosure proceeding as set forth in §4.14A(3) and (4) which state as follows:

"(3) DISTRESSED LOAN.—The term 'distressed loan' means a loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

"(A) The borrower is demonstrating adverse financial and repayment trends.

"(B) The loan is delinquent or past due under the terms of the loan contract.

"(C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.

"(4) FORECLOSURE PROCEEDING.—The term 'foreclosure proceeding" means—

"(A) a foreclosure or similar legal proceeding to enforce a lien on property, whether real or personal, that secures a nonaccrual or distressed loan; or

"(B) the seizing of and realizing on nonreal property collateral, other than collateral subject to a statutory lien arising under title I or II, to effect collection of a nonaccrual or distressed loan."

C. The Northcutts made application for restructuring according to the terms of said Act, but the Plaintiff has not properly determined the cost of foreclosure as required in §4.14A(2) and has not made the proper "computation of cost of restructuring" as required by 4.14A(e) and the restructuring thereunder.

D.The Plaintiff has not developed a restructuring policy as

required in 4.14A(g) which states as follows:

"(g) RESTRUCTURING POLICY.—"(l) ESTABLISHMENT.—Each farm credit district board of directors shall develop a policy within 60 days after the date of the enactment of this section, that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring policy of each qualified lender within the district."

E. Plaintiff has not furnished Defendants Northcutt proper explanation and reasons for refusal to restructure, and the reasons given are not proper reasons under said Act and have not been reached based upon proper consideration of the information which should be considered.

F. The requirements for reconsideration of actions are set forth in §4.14 have not been met and, in particular, The Credit Review Committee did not properly consider the independent appraisal.

G. In denying the initial application and in the denial by the Credit Review committee, there was improper consideration of other debt owed by the Northcutts to either creditors who were unsecured or to creditors who were secured in an inferior position to the Plaintiff, and in analyzing the cashflow of the Defendants Northcutt, there was an improper determination that there would have to be sufficient cashflow to meet all of the other debt requirements when in fact the only cashflow requirements to justify the restructuring would be the necessary cashflow to meet the servicing of the restructured debt to the Plaintiff in its first position of priority.

H. There was not proper consideration of the fact that the

Northcutts have disputed and contested the validity of the Eugene Embry and Exchange National Bank indebtedness and have asked for its cancellation, which is still pending in this foreclosure action, and the Plaintiff cannot make a proper determination until the validity of said indebtedness is determined because if the Defendants Northcutt are successful in setting aside said indebtedness, then there can be no question or doubt but that the cashflow capabilities of the Northcutts will be ample and sufficient to meet the cashflow requirements of the Plaintiff and its indebtedness.

I. Title 5, §501, et seq., of the Agricultural Credit Act of 1987 provides for state mediation programs, which requirements the State of Oklahoma has met. Defendants Northcutt have requested participation in the State Mediation Program from the outset, but the Plaintiff was unwilling to participate in the mediation program until the Credit Review Committee had acted. Now that the Credit Review Committee has acted, the Plaintiff is willing to participate in the mediation program, but has wrongfully and illegally taken the position that its participation in the mediation program in good faith is not required as part of the restructuring procedure and that the limitation on foreclosure set forth in §4.14A(b)(3) is not applicable to completion of participation in the mediation program in good faith. The Plaintiff is required to participate in the mediation program in good faith and the limitation on foreclosure is applicable until the mediation phase is completed in good faith, which has not yet even begun.

Section 503—Participation of federal agencies, provides as follows:

"(a) DUTIES OF THE SECRETARY OF AGRICULTURE.
(l) IN GENERAL.—The Secretary, with respect to each

program under the jurisdiction of the Secretary that makes, guarantees, or insures agricultural loans—(A) shall prescribe rules requiring each such program to participate in good faith in any State agricultural loan mediation program; (B) shall, on the date of the enactment of this Act, participate in good faith in any State agricultural loan mediation programs; and (C) shall—

(i.) cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 501; and; (ii.) present and explore debt restructuring proposals advanced in the course of such mediation. (2) NONBINDING ON SECRETARY.—The Secretary shall not be bound by any determination made in a program described in paragraph (l) if the Secretary has not agreed to such determination._

"(b) DUTIES OF THE FARM CREDIT ADMINISTRATION. —The Farm Credit Administration shall prescribe rules requiring the institutions of the Farm Credit System—
(l) to cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 501; and
(2) to present and explore debt restructuring proposals advanced in the course of such mediation."

J. The interest rates applied have not been determined and calculated by Plaintiff according to the statutes of the United States of America and according to its own rules and regulations.

K. The interest rates applied have not been made according to the terms of the promissory note.

L. The Affidavit in support of the Motion for Summary Judgment is incomplete and does not give the reasonable and necessary information to determine if the conclusions of the Plaintiff are correct. In particular, the default interest rate is improper.

I am making this Affidavit on behalf of Delmas Northcutt and Lou Northcutt on October 17, 1988. Lou Northcutt broke her leg and is, therefore, unable to come to the Law Offices of Little, Little, Little & Windel to sign this Affidavit.

Dated this 17th day, October , 1988.

s/ Delmas Northcutt
DELMAS NORTHCUTT

[Verification Omitted]